HAWKES *v.* BOWLES.

June 18, 1916.

[89 S. E. 93.]

1. Witnesses—(§ 144 (5)*)—Competency—Statutory Construction.—Code 1904, § 3346, providing generally that when one of the parties to a contract or transaction is incapable of testifying, the other party thereto cannot testify, does not disqualify the holder of a note from testifying against its maker because the payee is incapable of testifying.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 631; Dec. Dig. § 144 (5).* 13 Va.-W. Va. Enc. Dig. 943.]

2. Bills and Notes (§ 525*)—Bona Fide Purchaser under Statute—Sufficiency of Evidence.—In an action against the maker of a note, the evidence held to sustain the trial court's finding that plaintiff was a holder in due course without knowledge of any infirmity in the note or of facts indicating bad faith in taking it, such as constitute a defense under Negotiable Instruments Law (Laws 1897-98, c. 866 [Code 1904, p. 1468]) § 56.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.* 2 Va.-W. Va. Enc. Dig. 430.]

Appeal from Circuit Court, Henrico County.

Action by J. R. Bowles against Sallie G. Hawkes. Decree for plaintiff, and defendant appeals. Affirmed.

David Meade White, of Richmond, for appellant.

O'Flaherty, Fulton & Byrd and *Smith & Smith,* all of Richmond, for appellee.

KEITH, P. Bowles filed his bill in equity in which he states that he is the holder in due course of a note made by Sallie G. Hawkes for the sum of $600, dated April 4, 1911, and payable one year after date to her own order, negotiable and payable at the Church Hill Bank, Richmond, Va., which is secured by a deed of trust of even date with the note, executed by Sallie G. Hawkes to Howard Simpson, as trustee, conveying to him a certain three-story building and one acre of land, in the county of Henrico; that when the note became due it was not paid, and thereupon the plaintiff, through his attorneys, called upon Simpson, the trustee, to sell the house and lot. Simpson paid no heed to this demand, and the attorneys for Bowles addressed to him another letter again requesting him to proceed to sell the property held in trust by him, and the trustee still failing to act this

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

bill was filed, making Sallie G. Hawkes and Howard Simpson parties defendant, and praying the court to sell the real estate or so much as might be necessary to satisfy the debt due the complainant.

Mrs. Hawkes answered the bill and admitted that she signed the note of $600 held by the plaintiff; that it was payable to her own order one year after date at the Church Hill Bank, Richmond, Va.; that it was secured by a deed of trust to Howard Simpson, trustee; and she then alleges that the note was obtained from her by fraud of one D. D. Steele, from whom the complainant claims to have gotten it; that in 1911 respondent desired to have a house completed upon her property in Henrico county, and about that time she met Steele, who was an ex-convict, but that fact was unknown to respondent; that he represented to her that he was a carpenter and contractor and stated that he could do the work she desired done for the sum of $600, as he and his brother worked together and would do most of the work themselves; that he led her to believe that he would complete and finish the house for $600, and when respondent informed him that she did not have that much money in cash, he stated that he would do the work provided she would give her note for that amount secured by a deed of trust upon the property. This proposition was satisfactory to respondent, and she and Steele made an agreement whereby he undertook to do the work and finish it for $600, and respondent agreed to pay that amount. She states that she is not a business woman and did not understand that the note could be used by Steele or any other person until the work upon the building was completed; that she was not well acquainted with Steele and innocently trusted him, and believing that he would keep the note, as he had assured her he would do, she delivered it to him. Respondent denies that Bowles is a holder in due course of the note in question, and charges that he knew that Steele was an ex-convict, and knew that he had fraudulently obtained the note. She charges that Bowles did not pay the sum of $600 for the note, but that as a part of the consideration Bowles pretended to allow Steele a credit of $300 on account of the purchase of a farm in Caroline county, Va., which he conveyed to Steele. She avers that at the time Bowles acquired the note from Steele he conveyed his Caroline county farm to Steele for $1,200, and took a deed of trust for $900, and pretended to allow a credit of $300 on the note; that subsequently Bowles took another deed of trust on the farm for $400, for which he paid no consideration, and some time later Steele reconveyed the farm to Bowles without consideration, and after Bowles had actual knowledge of the fraud of Steele; and she further claims that even though Bowles had

no knowledge of the fraud perpetrated upon her by Steele at the time he acquired the note, still respondent would be entitled to a credit of $300 upon the note.

Upon the issues thus made evidence was taken, and the case coming on to be heard before the circuit court, a decree was rendered in favor of Bowles for the sum of $600, with interest, and directing that unless the note was paid by the defendant within 60 days from the date of the decrees, the land should be sold by W. E. Sullivan and M. J. Fulton, trustees appointed for that purpose. To this decree an appeal was allowed.

[1] To maintain the issue upon his part J. R. Bowles was sworn as a witness, whereupon counsel for the defendant objected to any testimony given by him, upon the ground that D. D. Steele, from whom Bowles obtained the note, is a convict in the penitentiary, and therefore Bowles was not a competent witness. This exception was overruled by the circuit court and constitutes the first assignment of error.

Section 3346 of the Code provides, among other things, that:

"Where one of the original parties to the contract or other transaction, which is the subject of the investigation, is incapable of testifying by reason of death, insanity, infancy, or other legal cause, the other party to such contract or transaction shall not be admitted to testify in his own favor or in favor of any other person whose interest is adverse to that of the party so incapable of testifying, unless he be first called to testify in behalf of such last mentioned party; or unless some person, having an interest in or under such contract or transaction, derived from the party so incapable of testifying, has testified in behalf of the latter or of himself as to such contract or transaction; or unless the said contract or transaction was personally made or had with an agent of the party so incapable of testifying, and such agent is alive and capable of testifying."

The original parties to the contract or other transaction, in this case, were Mrs. Hawkes and D. D. Steele. D. D. Steele is a convict in the penitentiary, and Mrs. Hawkes, the other party to the transaction, was permitted to testify without objection as to her competency, and her deposition appears in the record in this case.

An authority in point is the case of Grigsby *v.* Simpson, Assignee, 28 Grat. (69 Va.) 348. In that case Grigsby and several others executed a bond to Alfred Moss. Moss assigned the bond to Simpson and died. Simpson brought suit and the obligors undertook to prove that the bond was given for an usurious consideration. Their evidence was objected to and excluded. The court said:

"The two witnesses offered in this case were two of the obli-

gors. Moss, the obligee, was dead. The contract, which was the subject of investigation in this case, was the bond executed by these two witnesses with three other obligors, payable to Moss, the obligee. Moss was one of the 'original parties to the contract,' and he was dead. Certainly the case comes within the precise terms of the statute, and upon its literal interpretation these witnesses must be excluded, because one of the original parties to the contract made by and with them (Moss, the obligee) is now dead."

Moss occupied the same relation to that case that Steele does to this. One was disqualified by death and the other by confinement in the penitentiary, with the result that the obligors, standing in a position similar to that of Mrs. Hawkes, were disqualified as witnesses. We can see no ground upon which to exclude the testimony of Bowles as an incompetent witness, and this assignment of error is overruled.

[2] Coming to the evidence as to the execution of the note, we find that Mrs. Hawkes contracted with Steele, a colored carpenter, to furnish certain material and do certain work toward the completion of a dwelling house upon an acre of land attached thereto, in the county of Henrico, for which she agreed to pay Steele the sum of $600. Not having the ready money to pay for the material and work, on April 4, 1911, she drew and signed her negotiable note for $600, making the same payable to her own order at the Church Hill Bank in Richmond, Va., and then as payee indorsed her name on the back of the note. At the same time she executed a deed of trust upon the three-story building and acre of land to secure the payment of the note, and then delivered the note and deed of trust to Steele for the purpose of raising the money with which to buy the building material and pay for the carpenter's work. James C. Page, an attorney, testifies, among other things, that in March, 1911, Steele came to his office and stated that Mrs. Hawkes wanted him to complete the house she was building, and he wanted Page to see Mrs. Hawkes with reference to preparing the deed of trust and note; that Page went with Steele and saw the incomplete house and lot on which she wished to give the deed of trust; that Mrs. Hawkes was not at home at that time, but a few days afterward she came with Steele to his office and requested him to prepare the deed of trust and note, and to write a contract setting out the specifications and the material to be used in completing the building, which he did, and she signed the deed and note in his presence. Page further testifies that the note was delivered by Mrs. Hawkes to Steele for the purpose of enabling him to raise money on the note for the completion of the house which she was building; that the whole transaction was gone over thoroughly; that

he took pains to explain everything to Mrs. Hawkes, and she was thoroughly satisfied with the transaction at that time.

It seems that Steele inquired of Page if he knew where the note could be negotiated, and Page suggested that Bowles might take it as it was well secured; that Steele took the note to Bowles, who examined it and the deed of trust, and Bowles learning from Steele that Page had written the note and deed of trust in his office for Mrs. Hawkes, before buying the note called up Page and asked him if the note and deed of trust were all right, and Page assured him that they were.

The evidence shows that Bowles bought the note of Steele and paid for it as follows: A check of April 15th for $150, another of the same date for $100, and one of April 19th for $50, making a total of $300. The other $300 was paid by Bowles to Steele by selling and conveying to Steele in April, 1911, a farm in Caroline county for $1,200, and crediting $300 of the purchase price of the note on the $1,200, taking a deed of trust on the farm to secure the payment of the balance due by Bowles for the farm. Other transactions are referred to in the evidence which do not seem to have any material bearing upon the question of how Bowles acquired title to the $600 note.

The note in question in this case seems to conform to all the requirements of the Negotiable Instruments Act (Laws 1897-98, c. 866 [Code 1904, § 2841a]). It was duly delivered, and appellee, Bowles, stands as a holder in due course. Everything with respect to the execution and negotiation of the note is perfectly regular, and whatever fraud, if any, was perpetrated upon Mrs. Hawkes occurred after the negotiation of the note and consisted in the failure of Steele to live up to and perform the contract as a consideration for which the note was given. There is no sufficient evidence of knowledge brought home to Bowles of the existence of any infirmity in the note, and section 56 of the Negotiable Instruments Law provides that:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

We have been unable to discover such evidence in the record, and upon the whole case we are of opinion that the decree of the circuit court must be affirmed.

Affirmed.

CARDWELL, J., absent.

Editor's Note.—The competency of a party to a negotiable instrument to testif where another party thereto is incompetent by reason of death, insanity, infancy or other cause, like that of any other

witness is to be determined by the test, that he will either gain or lose by the direct legal operation and effect of the judgment in the action, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and vested interest, and not an interest remote, uncertain or contingent.

Competency of Maker.—Where the maker of a promissory note would either gain or lose anything by the result of the suit, he is disqualified as a witness on the ground of interest; but, where he would neither gain nor lose by the judgment and it could not be void against him in another suit, he is competent to testify. See Fuller *v.* Lendrum, 38 Iowa 353, 12 N. W. 340.

Where the liability of the maker over for certain payments of interest he had made upon the note in suit depended upon the event of the action, which was by an administrator, such maker is not a competent witness in his own favor and against the administrator, although he is not party to the suit. First National Bank *v.* Bressler, 38 Ill. App. 499.

In an action of trover by an administrator to recover the value of certain promissory notes delivered to his testator in his lifetime, and which it is alleged the defendant converted to his own use, this court holds that, as against the administrator, it was improper to allow the maker thereof, and another, to testify in behalf of the defendant, they being interested adversely to the administrator, and that the judgment for the defendant cannot stand. Bressler *v.* Baum, 42 Ill. App. 190.

On proceedings to establish a claim against the estate of a deceased bank officer for moneys alleged to have been taken from the bank and used by decedent and another, and to have been represented by certain notes of the other to the bank, the maker of the notes was incompetent as a witness. McElroy *v.* Allfree (Iowa), 108 N. W. 119.

Where a note is indorsed by the administrator of the payee to the payee's widow, who sues on it, the maker is not a competent witness to testify to a personal transaction with decedent claimed to constitute payment. If the suit had been by the administrator on the note, confessedly the defendant would not have been a competent witness to prove payment made by him to the deceased. Code 1896, § 1794. The transfer of the note did not operate to take the defendant out of the exceptions to the statute rendering parties competent witnesses. The plaintiff's claim to the note is in succession to the deceased's ownership, and the transfer did not revive defendant's competency as a witness. The court properly excluded the evidence. Hodges *v.* Denny, 86 Ala. 226, 5 South. 492; Moore *v.* Walker, 124 Ala. 199, 26 South. 984. Carpenter *v.* Stiggins, 146 Ala. 681, 40 So. 216.

Joint Maker.—The plaintiff having paid a note signed by himself, decedent and R., as joint makers, sought to recover the amount from decedent's estate, claiming to have been only surety for decedent. He alleged that the note was a renewal of a note in which R. was principal but that when the renewal note was made, because of some transactions between decedent and R., it was agreed that decedent should be the principal. Held that, because of his interest, R. was incompetent to testify for plaintiff. Thornburg *v.* Allman, 8 Ind. App. 531, 35 N. E. 1110.

In a proceeding to allow, as a claim against the estate of a decedent, a note of which decedent was a joint maker, the surviving

joint maker, who was also the executor of such estate, was incompetent as a witness, to prove a personal transaction between him and decedent, without which proof such claim was barred by the statute of limitations as against the estate, as it was for his interest to have such claim established. In re Congdon, 48 N. Y. S. 871, citing Wilcox *v.* Corwin, 117 N. Y. 500, 504, 23 N. E. 165, 166.

Maker of Accommodation Paper.—Where there is no evidence that the plaintiff's testator, who purchased an accommodation note in the ordinary course of business, had any knowledge of the facts surrounding the execution of the note when he purchased it, and the plaintiff sues on the note as his legatee, the maker is incompetent to testify to such facts. Keenan *v.* Blue, 240 Ill. 177, 88 N. E. 553.

Maker Where Payee Dead.—In a bill by an alleged surety against the administrator of the payee of a note, to restrain the prosecution of a suit thereon, on the ground that he signed the note as surety, and that payment of the note had been extended without his knowledge or consent, the principal in the note is a competent witness for the complainant to show the extension of payment. Combs *v.* Bradshaw, 6 Ill. App. 115.

The contract between the indorser and payee of a promissory note is distinct from that between the payee and the maker. Therefore in a contest between the indorser and payee, which could not in any way affect the liability of the maker, he was not rendered an incompetent witness by the death of the payee. Freeman *v.* Bigham, 65 Ga. 580.

But the maker of a note cannot testify as to personal transactions between himself and the deceased payee thereof, as against one to whom the payee had given the note. Wangner *v.* Grimm (N. Y.), 62 N. E. 569.

Maker Where Indorser Dead.—In an action on a note between the payee and his deceased indorsee's administrator, the maker of the note is not a part interested in the event, and hence is competent to testify to personal transactions of deceased. Crampton *v.* Foster, 51 N. Y. S. 883.

The principal maker of a promissory note is a competent witness in a suit thereon against the administrator of a deceased surety alone, to prove its execution by the intestate. In such case the witness is not a party to the suit, and his interest is equally balanced, and his testimony is not given on his own motion, or in his own behalf. Sconce *v.* Henderson, 102 Ill. 376.

The maker of two notes having different sureties thereon, and who cannot gain, whatever be the determination as to the relative liability of the sureties, may testify to a transaction between all parties, by which the responsibility of certain sureties was assumed by the others, though one of the sureties be dead. Adams *v.* Brown (Ky.), 32 S. W. 282.

In Benjamin *v.* Ver Nooy, 55 N. Y. S. 796, 797, it was held that in an action against the administrator of a surety on a note, the maker, who was not a party to the action, is not incompetent to testify that he informed the surety that the note had been diverted from its original purpose, and that the surety assented. The court said: "The defendants contend that, although Calkins was not in like manner interested, he was interested, because, if the plaintiff should fail to recover of these defendants, Calkins would be liable over to the plaintiff for all his costs and expenses in this action. Calkins is not a party to this action. The result would in no way

affect his liability upon the note. He could be held liable only for the costs and expenses of the plaintiff in this action upon proof that he had practiced a fraud upon the plaintiff in inducing him to take note, or had warranted his title thus to use it. White *v.* Madison, 26 N. Y. 117. The judgment in this action would not be evidence against Calkins of either fraud or warranty, and therefore he had no disqualifying interest. Nearpass *v.* Gilman, 104 N. Y. 506, 10 N. E. 894; Hobart *v.* Hobart, 62 N. Y. 80. Calkins could show in such action against him, as the defendants sought to show in this, that the plaintiff knew all the facts respecting the alleged diversion of the note."

But in a suit against the maker of a note and others, brought by a bank after the death of an indorser, to set aside an alleged fraudulent conveyance by the maker of his property, the latter is incompetent as a witness to prove declarations made by the decedent in respect to an agreement, not appearing in the note itself, and tending to show a failure of consideration therefor. Deposit Bank *v.* Caffee, 135 Ala. 208, 33 So. 152.

Competency of Payee.—In an action upon a promissory note, the defendant defending as the administrator of a deceased person alleged to have been one of the signers thereof, the payee of the note is not a competent witness, he testifying that the executrix of the person to whom he had indorsed it, had released him as indorser. Bevan *v.* Fitzsimmons, 40 Ill. App. 108.

In an action by the administrators of an indorser against the maker, to recover the amount due upon a promissory note, the payee and indorser is not, disqualified, where he is not called on behalf of the indorsee (the party to his title), but on behalf of the maker, and against the indorsee; and the note being long due, it appears from the evidence that he received no notice of non-payment, so as to preserve recourse against him. Nearpass *v.* Tilman, 104 N. Y. 506, 10 N. E. 894.

Competency of Indorser.—A surety on a note on which the maker is sued cannot testify, as against the administrator of the deceased payee, to a conversation between himself, the maker, and deceased, tending to strengthen the maker's contention that the note had been paid other than in money, under an agreement between the maker and deceased, since the surety is interested in the event. Munz *v.* Colvin, 54 N. Y. S. 781.

In Hinkson *v.* Wigglesworth (Ky.), 48 S. W. 1079, it was held that, a surety in a note executed to plaintiff as renewal of a note to her deceased husband, though no judgment is asked against him, cannot testify for the principal as to transactions with the deceased payee in the original note. The court said: "The witness day is the surety on the obligation sued on, and, if the principal escapes liability, it is evident that he would be discharged from all liability; while, on the other hand, if a judgment should be rendered against the principal, and he should be insolvent, a suit might be maintained against the surety for the amount thereof. He has direct pecuniary interest in the issue between appellant and appellee, and is disqualified from testifying as a witness to transactions had with the decedent Hinkson in his lifetime." Hinkson *v.* Wigglesworth (Ky.), 48 S. W. 1079.

Holder—Donor of Check in Trust.—One to whom a check is given merely for the purpose of making a gift causa mortis to a third person to whom he gives a due-bill for the amount, is not incompetent by reason of interest to testify in a controversy between the donee

and the donor's administrator as to the validity of the gift. In re Estate of Taylor (Pa.), 18 L. R. A. 855.

Agent of Maker.—The agent of the defendant in an action by the administrator of a decedent to recover the amount of certain promissory notes, claimed to have been executed by the defendant through such agent, is not bound by the judgment, either directly, by its own force, or indirectly, as evidence against him of misconduct or negligence, and is not so interested in the event of the suit as to be disqualified. Nearpass *v.* Tilman, 104 N. Y. 506, 10 N. E. 894.

Person Assuming Payment of Note.—A witness is not disqualified because of interest on the ground that he assumed payment of a note where such agreement is without consideration and is a mere nudum pactum. Svensson *v.* Lindgren (Minn.), 145 N. W. 116.

T. B. B.

WARD *v.* AMERICAN AGRICULTURAL CHEMICAL CO.

In re FLOYD & HAYES' ESTATE.

February 29, 1916.

[232 Fed. Rep. 119.]

1. Bankruptcy (§ 184 (2)*)—Ownership of Property—Choses in Action—Recording.—A contract between the seller and buyer, whereby the latter agrees to assign all accounts, notes, etc., taken for the property when resold, and to collect them in trust for the seller, is not required to be recorded by the statutes of South Carolina as interpreted by the Supreme Court of that state, and entitles the seller to the possession thereof as against the buyer's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184 (2).*]

2. Courts (§ 366 (1)*)—Rules of Decision—Construction of State Statutes.—The construction of the South Carolina recording acts as not applying to the assignment of choses in action is binding on the federal courts, though contrary to an earlier decision of the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. § 366 (1).*]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

In the matter of the estate of Floyd & Hayes, bankrupts. From an order allowing in part the claim of the American Agricultural Chemical Company (225 Fed. 262), R. E. Ward, trustee in bankruptcy, appeals. Affirmed.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.